

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF TENNESSEE
3 WESTERN DIVISION

4

5 JESSICA JONES, et al,

6 Plaintiff,

7 vs.

NO. 2:20-cv-2892

8 BAIN CAPITAL PRIVATE EQUITY, et al,

9 Defendant.

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12 EXPEDITED TRANSCRIPTION

13 VIA FTR RECORDING

14 BEFORE THE HONORABLE TU PHAM

15 UNITED STATES MAGISTRATE JUDGE

16 NOVEMBER 12, 2021

17 LISA J. MAYO, RDR, CRR
18 OFFICIAL REPORTER
19 FOURTH FLOOR FEDERAL BUILDING
20 MEMPHIS, TENNESSEE 38103

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UNREDACTED TRANSCRIPT

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1 FRIDAY

2 NOVEMBER 12, 2021

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6 **THE COURT:** So my clock says 11:02. So let's go
7 ahead and get started. Hello everyone, I'm Judge Pham, and
8 I'll be presiding over the argument today, and I think if
9 you-all have already received the various notices and orders
10 that Judge Lipman has entered, I'll be the referral
11 magistrate judge going forward on these cases. But for
12 today, I want to hear from the parties, give you an
13 opportunity to be heard on this motion to coordinate the
14 depositions. I know we have a lot of people on the call, but
15 maybe to streamline things a bit if I could just have the
16 attorneys who will be arguing announce their name for the
17 record. Obviously we're doing this by video. It is being
18 recorded, but we don't have a court reporter here.

19

20 On behalf of the plaintiffs, let's see, who will
be arguing this motion?

21

22 **MS. SIMS:** Good morning, Your Honor. Victoria
23 Sims from Cuneo, Gilbert and LaDuca. I am counsel for the
24 plaintiffs Fusion, but I'll be speaking on behalf of all of
the plaintiffs although by cocounsel Ms. Malone and
25 Mr. Bennah may jump in as needed. And I have on with me

1 Karen Garvey from Labaton Sucharow but she will not be
2 arguing for plaintiffs today.

3 **THE COURT:** All right. And then who will be
4 arguing for the defendant?

5 **MR. KAISER:** Good morning, Your Honor. Steve
6 Kaiser from Cleary Gottlieb, arguing for -- we represent the
7 Varsity defendants and Bain and Charles Bank. I think we'll
8 be presenting the primary argument for the defendants but
9 other counsel are here as well and I'd like them to introduce
10 themselves if they choose to.

11 **MR. COGGINS:** Your Honor, Paul Coggins from Locke
12 Lord on behalf of my muted partner Brendan Gaffney. He'll
13 unmute himself and be the one arguing for defendant Webb
14 today.

15 **MR. GAFFNEY:** I'm Brendan Gaffney on behalf of
16 Locke Lord on behalf of Webb. I'll be unmuted when it's my
17 turn to speak, of course.

18 **THE COURT:** Anyone else? No. Okay.

19 All right. We'll hear from the plaintiffs first
20 on this joint motion?

21 **MS. SIMS:** Thank you, Your Honor. As I said, I'm
22 Victoria Sims from Cuneo Gilbert and Laduca and I'll be
23 presenting the primary argument on behalf of plaintiffs
24 today.

25 So, Your Honor, I thought we would start off with

1 the areas in which plaintiffs and defendants have agreement.
2 The first point on which plaintiffs and defendants all have
3 agreement is that all plaintiffs should be permitted to
4 attend and question witnesses at all depositions in the three
5 related actions. Plaintiffs and defendants also agree that
6 Fusion Elite needs seven hours with each percipient witness
7 and 15 hours with Varsity's corporate witnesses, and that's
8 set forth as the defendants have mentioned in the deposition
9 stipulation that was entered in Fusion.

10 The parties also agree that the Fusion case is
11 narrower than the two other related actions, the Jones and
12 American Spirit actions. So what does this mean? What this
13 means to us is that the parties simply need to determine for
14 depositions noticed by Fusion how much additional time
15 American Spirit and Jones plaintiffs need to ask about their
16 additional topics after Fusion plaintiffs have finished their
17 seven hours of questioning, and of course the same would
18 conversely be true for depositions noticed by Jones or
19 American Spirit plaintiffs.

20 And in making our proposal for additional hours,
21 we really tried to be as conservative as possible. For USASF
22 30(b) (1) and 30(b) (6) depositions we proposed only one
23 additional hour per group per case. So that would be nine
24 total hours of testimony at each deposition at most, and
25 that's very low in comparison with some of the cases we've

1 seen where, for instance, 14 hours of testimony was allowed
2 for witnesses noticed in more than one case.

3 USASF is active primarily in two markets, All
4 Star cheer apparel market and the All Star competition
5 market. So we have proposed one additional hour per case to
6 allow those plaintiffs to ask questions specific to their
7 clients who are not in Fusion case, for instance, an apparel
8 manufacturer, an independent event producer, camp producer as
9 well as parents who indirectly paid Varsity by paying
10 gymnastics or schools for apparel and attendance at
11 competitions.

12 Now for Varsity, we said there are additional
13 markets at issue in which Varsity engaged in conduct and
14 about which Varsity has knowledge that are at issue in the
15 Jones and American Spirit case but not in the Fusion. For
16 instance, there's school cheer. Those are the cheerleaders
17 that you typically see at high school games, and school cheer
18 involves the school cheer competition market and the school
19 cheer apparel market. There's also the camps market which is
20 the two camps markets, the school cheer camp market and the
21 all star cheer camp market. Those are also not at issue in
22 Fusion, and there are other types of damages: Indirect
23 purchaser damages, damages for Varsity state of play market,
24 damages for Varsity TV, damages for camp fees.

25 So for Varsity, we said two additional hours will

1 be needed for each of those cases, for American Spirit and
2 Jones each, to address those additional markets and those
3 additional damages with the 30(b) (1) witnesses, and three
4 additional hours per case will be needed for Varsity's
5 30(b) (6) deposition.

6 And Your Honor, I just want to emphasize that's
7 the upper limit. It may be for some depositions the other
8 groups don't anticipate any questions and don't notice the
9 deposition. Deposition could be noticed only in Fusion and
10 it would be seven hours or only in Jones or only in American
11 Spirit. For instance, the Albee deposition that's coming up
12 next week was noticed in two cases, Fusion and Jones. So
13 that will be nine hours of questions max. And we really
14 tried to be as reasonable as possible with the defendants
15 while preserving our clients' rights to seek the most basic
16 discovery into their claims. We've asked for a lot less time
17 than what's been allowed in other complex multi-case
18 litigations, like Qualcomm where 14 hours was allowed for two
19 consolidated actions, and Intel where even more than 14 hours
20 was allowed for some witnesses.

21 So, Your Honor, all we ask is that each group be
22 given enough time to question witnesses about the claims
23 their clients are making and the particular markets at issue
24 in their cases. Thank you.

25 **THE COURT:** Okay. Anyone else on behalf of

1 plaintiffs before I left the defense respond?

2 **MS. MALONE:** Good morning, Your Honor. This is
3 Katherine Malone with the Joseph Saveri Law Firm on behalf of
4 Jones plaintiffs. We just want to briefly reiterate, you
5 know, and second what Ms. Sims said. We agree to this
6 proposal sort of generally and would like it cover so we
7 don't have to run to the court every time there's a cross
8 notice deposition and have a flurry of unnecessary motion
9 practice before you.

10 You know, as explained by Ms. Sims, there are 55
11 depositions allowed for in the Fusion deposition agreement.
12 We have three additional defendants and have proposed
13 deposition protocol to defense counsel that reflects that.
14 So we're really all just looking here for framework that will
15 allow all the parties to participate without, again,
16 unnecessarily involving this Court. Yeah. We just want to
17 make sure that every action and group, you know, has
18 sufficient time to introduce their documents and seek the
19 information that they need from percipient witnesses. Thank
20 you.

21 **THE COURT:** Okay. Thank you. Anyone else for
22 plaintiffs? No? Okay.

23 All right. I'll hear from the defense at this
24 time.

25 **MR. KAISER:** Thank you, Your Honor.

1 Obviously the defense have a very different take
2 on this. Judge Lipman ordered these plaintiffs to coordinate
3 on depositions and she was very clear on this, and what
4 plaintiffs have done here is basically they want the benefit
5 of coordination, which is to say they all get to show up at
6 every deposition and ask questions, but they don't want any
7 restriction related on what they're doing in the depositions.

8 In fact, what they want is to take the federal
9 rules which say one day of 7 hours as Your Honor is well
10 aware and turn that into multiple days of up to 11 hours in
11 the 30(b) (1) depositions, which of course would be a 57%
12 increase in the deposition time.

13 Now, couple of things you didn't hear from the
14 plaintiffs. I think it's important that they be said, is the
15 plaintiffs don't deny that Fusion Elite, Jones and the
16 cheerleading part of American Spirit, in other words these
17 three cases, arise from a common nucleus of operative facts,
18 and they concede -- at least they have to us -- the discovery
19 as to the noncheerleading parts of American Spirit have been
20 stayed pending the Court's action on the defendant's motion
21 to dismiss. They also don't deny, and this is important,
22 that the witnesses who they have noticed at least so far all
23 relate solely to cheerleading. There's no other witnesses
24 that have been notice today deposition. All we're talking
25 about today is discovery relating to cheerleading.

1 They also do not deny that they have not made any
2 showing of any kind of a need for additional time with any
3 particular witness which is what the federal rules require.
4 Essentially their argument is they don't have to, and --
5 because they don't want to trouble the Court, which is a
6 laudable goal to be sure but that's not how it works. They
7 have to make a showing to us initially and then if we can't
8 agree then that is what the Court is here for, is to resolve
9 disputes. It's not to whitewash disputes by ordering broad
10 relief that hasn't been justified by the showing of a party
11 seeking the relief which is the plaintiffs here.

12 So what the plaintiffs -- what have they said?
13 Well, they say Jones and American Spirit go into additional
14 areas of cheerleading than Fusion Elite does but that's
15 backwards. The point is that Fusion Elite is a subset of the
16 other two cases. Plaintiffs should not get more time because
17 one of the cases has less allegations than the other two.
18 That's backwards.

19 Now Ms. Sims said, well, we agreed to seven
20 hours. That's not really true. What we said was in the
21 Fusion Elite case when that was the only case we were talking
22 about they could take a deposition consistent with the
23 federal rules of seven hours. We certainly didn't concede
24 that seven hours was necessary or desirable or appropriate.
25 All we said was that was the limit.

1 Now they said -- the other thing they say is they
2 have to prove different things because the class they seek to
3 represent have different damage theories. For example,
4 plaintiffs in Fusion Elite are direct purchasers and
5 plaintiff in Jones are indirect purchasers, which is to say
6 individuals who purchased from Varsity's customers or its
7 customers' customers down the line. Well, that's true, but
8 it's irrelevant to these proceedings because it's irrelevant
9 to whether these witnesses, the particular witnesses at
10 issue, should be subjected to 57% more deposition time than
11 the federal rules would otherwise allow.

12 Again, plaintiffs have made no showing or even
13 tried to explain why these witnesses can be expected to have
14 any information relating to these issues that they say are
15 different, none of which really has anything to do with
16 Varsity. What Varsity's customers and their customers'
17 customers did in terms of pricing and so forth is not
18 something that they're saying they're going to be asking
19 Varsity's witnesses about. So that's really a little bit of
20 a sideshow, a red herring, however you want to put it. It's
21 really not germane to what we're talking about here.

22 The other thing I would want to note is that
23 plaintiffs have a generous allotment of depositions in this
24 case. As Your Honor knows, the federal rules as a background
25 rule permit ten depositions of seven hours each. As things

1 stand, plaintiffs have 55 depositions in the protocol, which
2 would total 385 hours, which is 550% more than the federal
3 rules would allow, you know, at a baseline. Now they want
4 57-plus percent more time in terms of hours. And on top of
5 that -- and I think Ms. Malone alluded to this -- plaintiffs
6 and Jones have sent a demand for dozens of additional
7 deposition allotments -- although again they haven't
8 specified the deponents -- and hundreds of additional hours
9 beyond what they were seeking from this Court today and I
10 imagine that American Spirit may be next in seeking, you
11 know, more expansion.

12 So plaintiffs' motion should be denied. As
13 defense has said, we would happy to entertain specific
14 request as to specific witnesses for additional time where it
15 is warranted by that particular witnesses circumstances.
16 They have steadily refused to engage with us on that.
17 They've refused to even talk about that topic with us which
18 is a grave disappointment from our perspective.

19 Plaintiffs should not be allowed to end run the
20 process because they don't feel like it, feel like
21 undertaking it, they don't feel like they have time to do or
22 they don't think defense will be reasonable. They haven't
23 tried. Federal rules require that. They require meet and
24 confer. In fact, they require individual showings and they
25 haven't done any of that. I will say I suspect if they

1 tried -- if they had tried we could have resolved this a long
2 time ago. Unless Your Honor has questions, that's what I had
3 to say.

4 **THE COURT:** I may have some follow-up questions,
5 but I want to allow the other attorneys for the defense to be
6 heard if they want to argue.

7 **MR. GARRISON:** Your Honor, Grady Garrison on
8 behalf of US All Star. I join in in Mr. Kaiser's arguments.
9 I have a couple of additional observations to make. The
10 plaintiffs claim to need fact discovery back to 2004 while
11 the antitrust statute of limitations reaches back only to
12 2016. Surely they should be required to show particularized
13 need for each witness they seek to depose back to that early
14 date. This should be done on a case-by-case basis and they
15 certainly have not done this today.

16 Further, I would note that US All Star is
17 positioned in a very different way as a defendant in this
18 case. It has consumed over half of its insurance coverage
19 available to it and the depositions have not even begun. US
20 All Star is a small Tennessee nonprofit corporation, and as
21 Magistrate Claxton observed in a prior hearing after she
22 looked at its balance sheet, she said that she, quote, didn't
23 see much in there, end of quote.

24 We're talking about survival for US All Star.
25 It's the only meaningful body out there that provides for all

1 star cheerleading athlete protection and safety guidelines,
2 sanctioning of events and impartial judges, athlete
3 protection and safety guidelines being the most important.

4 So we submit that before we just run off and
5 allow carte blanche depositions that they should be required,
6 the plaintiff, to show particularly for each witness what
7 they really need. It's very critical from US All Star.

8 **THE COURT:** Mr. Garrison, some of those issues
9 sounds like it might be beyond the scope of the motion that
10 was set for today.

11 **MR. GARRISON:** Well, I thought it was important
12 for Your Honor to know that, to know a little bit about our
13 organization and how it can be life threatening to this
14 defendant. It's very important to us, and that's why I felt
15 compelled to make those statements.

16 **THE COURT:** All right. Very well. Anyone else
17 for the defense?

18 **MR. GAFFNEY:** Hi, Your Honor. I'm Brendan
19 Gaffney. I'm counsel for defendant Jeff Webb and he is only
20 a defendant in two of the cases, the Jones case and the
21 American Spirit case, not named as a defendant in the Fusion
22 Elite matter and I would echo a little bit of what Mr. Kaiser
23 said is to depose any witness, you know. They haven't
24 articulated any particularized need for why Mr. Webb would
25 need to be deposed for longer than seven hours. We haven't

1 even begun to discuss timing of his deposition, hasn't been
2 noticed yet; and, you know, if they were to offer such a
3 particularized showing for why they needed more than seven
4 hours with Mr. Webb, that's a dialogue we'd certainly be
5 willing to entertain and discuss at the appropriate time, but
6 it's premature to determine that 11 hours should
7 automatically apply to Mr. Webb and along with all other
8 witnesses, particularly, you know, when the 11 hours --
9 that's going to inevitably spill over into two-day
10 depositions. And when you factor in breaks and starting
11 time, that ends up being a pretty excessively long
12 deposition, and I think there should be some showing for why,
13 you know, Mr. Webb or any other particular witness for that
14 matter should have to sit for that period of time for a
15 deposition, particularly where the issues are so common.

16 So if they were to show such we would be -- might
17 be willing to -- or able to reach some sort of potential
18 compromise.

19 **THE COURT:** Well, wouldn't the plaintiffs be
20 entitled to the 21 hours normally --

21 **MR. GAFFNEY:** I think --

22 **THE COURT:** -- Mr. Kaiser?

23 **MR. KAISER:** If I could address that briefly.

24 So in sort of a -- the plaintiffs have raised
25 that issue, of course, and I would say no. I think this is

1 just like an MDL where there's coordinated pretrial
2 discovery. There's no -- when that happens, the baseline is
3 seven hours. This isn't an MDL because the cases were all
4 either filed here or moved here, but in any event they're
5 here and they're being coordinated.

6 Judge Lipman certainly said they should be
7 coordinated which is the same that's used in the MDL context,
8 coordinated pretrial proceedings. They have been
9 coordinated. They're on the same schedule in every sense.
10 It's just like an MDL.

11 Now are there instances where people in MDLs have
12 gotten more than seven hours with particular witnesses as
13 Ms. Sims alluded to? Yes. That does happen from time to
14 time. That's true. I'm not -- I've been doing this for, you
15 know, geeze, 25 years. I've never seen a situation where a
16 court has entered in -- entered a blanket order just saying,
17 you know, we're going to have -- notwithstanding the
18 seven-hour rule we're going to make it more for every
19 witness.

20 They've cited a few stipulations and some things
21 which were -- as I understand were asked to particular
22 witnesses typically, and you know, again, it's not an issue
23 of is every witness going to be doable in seven hours.
24 Frankly I think if they were efficient about it they could
25 definitely get the witnesses done in seven hours, but, you

1 know, there's a discussion that needs to be had there as to
2 particular witnesses but not every single witness. That
3 would be unprecedented, and, you know, lawyers in this very
4 case who are at these very law firms have been taking
5 depositions in cases far more complicated than this one, like
6 the generic drug litigation which may be the most complicated
7 case ever brought in the United States, and those depositions
8 typically are seven hours, and there's multiple parties,
9 multiple cases, multiple classes, the whole thing.

10 **MS. SIMS:** Your Honor, may plaintiffs respond?

11 **THE COURT:** Yes. Let me just make sure I've
12 heard from all the defense attorneys who wish to be heard on
13 this. Anyone else? Okay. Looks like no.

14 Ms. Sims, yes, you can respond.

15 **MS. SIMS:** Thank you, Your Honor.

16 So as Mr. Kaiser mentioned in Fusion alone, the
17 deposition stipulation allows for 55 nonexpert witnesses. We
18 do not think it would be efficient to litigate these issues
19 55 times or even 25 times. We'd like to go to the court and
20 get it done, and that's how it's usually done in these kinds
21 of cases. In the hard disk drive suspension assembly
22 litigation it was agreed among counsel, among defense and
23 plaintiffs, that two additional hours would be added for a
24 party in a related. Even in an MDL, Kohn noticing a
25 defendant's deposition.

1 Same issue in Qualcomm. This is how it is
2 typically accomplished. We don't want to bother the Court
3 every single time for every single witness.

4 That being said, with respect to, for instance,
5 the Varsity witnesses, most of the witnesses noticed have
6 worked for Varsity for well over a decade, and they've all
7 produced thousands of documents in just the Fusion case.
8 Mr. Webb worked for Varsity for 46 years. I think that
9 entitled us to at least a day and a half with him. He
10 produced thousands of documents just in the Fusion case,
11 which again relates to two markets, but he has knowledge
12 about six markets.

13 Ms. Wright, Leslie Wright from Varsity was with
14 Varsity for 23 years. Bill Seely, 30 years. John Nichols,
15 27 years. John Newby, 28 years. Nicole Lauchaire, 15 years.
16 Brian Carroll, 24 years. Damianne Albee, 21 years. Jackie
17 Kennedy, 10 years. And they've all produced over a thousand
18 documents and many of them have knowledge of at least three
19 and up to six markets.

20 Mr. Kaiser refers to this as just the cheer
21 industry, but the cheer industry involves six different
22 markets that are at issue here. All star cheer apparel, all
23 star cheer competitions, school cheer apparel, school cheer
24 competitions, all star cheer camps and school cheer camps.
25 Those all require time for separate questioning.

1 Mr. Kaiser mentioned that we're seeking an
2 increase of 57%, but as Your Honor noted, in three cases we
3 would be entitled to 21 hours. So we're being extremely
4 modest where we're not even seeking two full days of
5 depositions across three cases.

6 Mr. Kaiser seems to say that these cases are all
7 one case, that they should be treated as an MDL, but that's
8 not the case at all. They haven't been consolidated. In
9 fact, the coordination order that Mr. Kaiser referenced
10 states that each of these cases is brought on behalf of
11 largely nonoverlapping proposed classes of persons and
12 entities whose interests may come into conflict and who may
13 need or desire to take different positions, and thus, must
14 not be consolidated and should continue to have distinct sets
15 of counsel, counsel that should be allowed to pose their own
16 questions at each of the depositions.

17 The deposition stipulation does not say that all
18 three cases have to fit into one day of questioning. It says
19 that discovery will be coordinated to the extent feasible and
20 that's exactly what we've done. We've cut down the permitted
21 deposition time by ten hours, almost 50%, to only request
22 11 hours maximum where all three cases notice the deposition.

23 Your Honor, Mr. Grady (sic) spoke about USASF and
24 their unique position, and as I said at the outset, we made
25 an accommodation for USASF. We've offered them only one

1 additional hour per case. So if all three cases notice a
2 deposition of, for instance, Mr. Chadwick who is with USASF
3 for over ten years, then that will be only nine hours of
4 questioning. That can be done in one day easily. And if two
5 cases notice then only eight hours of questioning. That's
6 barely more than what would be allowed in one case. And
7 we're asking for that for three cases. So we have taken
8 USASF's position into account and we've made the accomodation
9 for that as set forth in our reply.

10 **THE COURT:** Is that set forth in your proposed
11 order as well?

12 **MS. SIMS:** It is not in the proposed order, but
13 we would be of course be willing to modify it and resubmit
14 it.

15 **THE COURT:** Okay. All right. Any further
16 argument for the plaintiffs before I let the defense have the
17 final word on it?

18 **MS. MALONE:** Yes, Your Honor, hi. I just wanted
19 to correct the record on -- with regard to the proposed Jones
20 deposition protocol. I believe Mr. Kaiser said that we were
21 seeking dozens of new depositions. In fact, we're seeking 15
22 depositions, five for each of the three additional
23 plaintiffs, Bain, Charles Bank and Mr. Webb; and just to
24 again echo what Ms. Sims said about Mr. Webb, he's a pivotal
25 witness in this case. He's a key person. I believe he

1 described himself as cheerleading at one point. I mean, he
2 created this entire industry. So, you know, we understand
3 he's just one witness in the case, but, you know, he's one
4 where potentially the most time would be needed and we're
5 still making a reasonable compromise.

6 **THE COURT:** Okay. Defendants?

7 **MR. KAISER:** The one thing I'd like to say, Your
8 Honor -- and I appreciate your taking the time to hear us all
9 out so thoroughly -- when we appeared before Judge Lipman in
10 this case, at least in one of these cases, this issue of
11 depositions came up and this is where we all are moving back
12 to. I just wanted to quote something that the defense lawyer
13 Mr. Falanga said at that time. He said -- he said, "I agree
14 with Mr. Kaiser that the depositions -- as far as depositions
15 I think that everyone should know, hey, on such and such a
16 date we're going to take so and so's deposition. If you want
17 to be there, be there. If you're not there, then you don't
18 get a second bite at the apple. That I agree with. "

19 So this was before the Court and the Court agreed
20 with that statement. The Court agreed that there should be
21 coordination. This is just like an MDL. MDLs are not
22 consolidated -- all the cases aren't consolidated. Ms. Sims,
23 if that's what she was getting at, that's just not true.
24 They are coordinated for pretrial proceedings which is
25 exactly what is going -- what should be going on here. The

1 cases that they have cited to the Court, if you look at them
2 as we have, you'll see that they are not situations where
3 blanket, you know, extra hours for all depositions were
4 granted. They were very specific to particular witnesses.
5 Typically they were stipulations. Again, we haven't even
6 been approached to do a stipulation. It was just give us 57%
7 more time or we're going the Court. So, you know, maybe
8 there is a stipulation to be gotten -- to be obtained as to
9 certain witnesses, but there's no precedent for this sort of
10 blanket, you know -- forget about the federal rules and
11 coordinated proceeding, we're going to go with 11 hours.

12 **THE COURT:** Okay. All right. Mr. Garrison?

13 Hold on, Ms. Sims.

14 **MS. SIMS:** Your Honor -- apologies.

15 **THE COURT:** One second. Were you trying to
16 respond?

17 **MR. GARRISON:** Yes, Your Honor. Notwithstanding
18 any accomodation to Mr. Chadwick or any other US All Star
19 employees, US All Star still has to attend all of these
20 depositions to protect its interests so the burden is still
21 there. Thank you.

22 **THE COURT:** Mr. Gaffney?

23 **MR. GAFFNEY:** Yes. Just to touch on one thing
24 is, you know, Ms. Sims mentioned a lot of, you know, time
25 periods for how long various employees worked for Varsity.

1 You mentioned that, you know, Mr. Webb had been in the
2 cheerleading industry for 47 years, but, you know, to be
3 clear, yes, he's been involved in the industry for a very
4 long time, but we're talking about a four-year statute of
5 limitations in this case. So, you know, the fact that he's
6 been involved in the industry for a long time should not
7 automatically mean that he's to sit for an excessively long
8 period of time for his deposition.

9 **THE COURT:** Okay. All right. Ms. Sims?

10 **MS. SIMS:** Your Honor, if I may very briefly
11 respond to a couple of the statements that were made. First
12 of all, Mr. Kaiser stated that there is no allowance in other
13 litigation of this sort for general addition of time based on
14 a co-notice or cross notice by a related case. We submitted
15 such deposition protocols to Your Honor in our exhibits.
16 I'll read from just one of them, the hard disk drive
17 suspension assembly's antitrust litigation proceeding in the
18 Northern District of California. That's a litigation about
19 just one conspiracy, to be clear, and that deposition
20 protocol states that "if a witness is noticed for deposition
21 by counsel for class plaintiffs and counsel for any direct
22 action plaintiff, the deposition will be limited to nine
23 hours of deposition."

24 So that's a general allowance for two additional
25 hours for a co-notice by another group of plaintiffs, and

1 that is the case in many litigations like this. It's not
2 done plaintiff by plaintiff as Mr. Kaiser asserts.

3 As far as the statement that Mr. Kaiser
4 referenced by Mr. Falanga, Mr. Falanga or his colleague
5 Mr. Bennah I think who may be on his call, but I want to
6 clarify Mr. Falanga is counsel for plaintiffs and to the
7 extent that Mr. Falanga stated that the depositions across
8 cases should occur at the same time, that's exactly what
9 we're trying to accomplish. We're saying they're noticed for
10 the same days, just give us enough time to allow everyone to
11 ask their questions specific to their clients and the markets
12 in which they're making claims. That's all we're seeking.

13 **MR. KAISER:** Your Honor, if I could respond to
14 just one minor point. Ms. Sims keeps quoting from
15 stipulations that were entered into other cases which
16 obviously what people agree to for whatever reason really has
17 no bearing on anything and certainly not authority where a
18 court is entered or anything. I would just add in those
19 other cases we're talking about multi-billion dollar massive
20 entities and not what we're dealing with here which is
21 small -- essentially small businesses or medium size business
22 maybe in Varsity case in Tennessee.

23 I would also add that even the one she's cited is
24 different from this case in that there were people who had
25 opted out of the class actions and wanted to ask questions.

1 There's a very different scenario than we have here where the
2 parties were ordered to coordinate their discovery. That
3 would not be the case when we're talking about opt-outs who
4 may have very specific issues as to them. Here they have
5 made no showing of anything that's relevant to these
6 witnesses, Varsity witnesses, USASF witnesses, about
7 difference between their cases. I would just point that out.

8 **THE COURT:** All right. Well, I read all the
9 briefs and understood the parties' positions and did want to
10 give y'all an opportunity to argue in support of your
11 positions.

12 I would agree with the plaintiffs that in this
13 situation -- and I think they have -- I think all parties
14 here try to consolidate and follow the directive of Judge
15 Lipman, but insofar as what the default position is, what the
16 foundational position is on where the parties start, yes, it
17 is -- the starting point would be so ruled, but in this case
18 where you have multiple class actions and overlapping and
19 some maybe not so overlapping issues, number of parties that
20 need to be coordinated, coupled with what sounds like mostly
21 video -- and there may be some in person but video
22 environment. I know that is accounted for as far as
23 technical difficulty and whatnot and there may be some build
24 in there so far as delays, but even without that, conducting
25 the depositions by video, handling of documents, the scope of

1 discovery which is not really before the Court today. I know
2 a few of you have touched upon it, but insofar as ultimately
3 the relevant time period and those sorts of things, I'm not
4 really addressing that now, but what I'm saying is that given
5 the complexities of this case, the number of witnesses, the
6 class action nature but also the video component of what I
7 assume to be many or most of the depositions, I think that it
8 is reasonable to start off with what the plaintiffs have
9 proposed without an individualized showing as to each witness
10 why they should go over the seven hours as to all of the
11 cases.

12 So I agree that plaintiffs' position is the
13 correct one and is the most reasonable and, therefore, will
14 grant the motion by the plaintiffs to have the consolidated
15 but also slightly extended time period outside of what would
16 normally be allowed under the federal rules.

17 Now, having said that, this is what I see as the
18 default position and the parties I would expect wouldn't
19 abuse the allotted time period where they're utilizing it
20 just to ask irrelevant questions, certainly to harass a
21 witness, to call witnesses who don't need to be called, and
22 given some of the issues raised and concerns raised by the
23 defendant, that it wouldn't be misused or abused. I'm going
24 to assume that that's not going to be the case.

25 If it turns out that after some depositions there

1 is a demonstrated track record of abuse of the extended time
2 period, whether it be getting in overbroad areas or -- and I
3 say that because I assume that not all the time will be used.
4 Even if someone notices a co -- another plaintiff or third
5 plaintiff notices a deposition which then ups the time period
6 slightly, it doesn't necessarily mean that the entire time
7 period, whether it's 7, 9 or 11 hours, would always be
8 utilized, and that the parties would be judicious in making
9 their decision as to when notice a party and how to utilize
10 that time. I know under the proposed order, it will be up to
11 plaintiffs' counsel to coordinate that to minimize any
12 prolonging -- unnecessary prolonging of the deposition.

13 So while not inviting additional motion practice
14 because there's been quite a bit so far, I'm not foreclosing
15 the defendants of bringing to the Court's attention at the
16 appropriate time if there is any evidence of any abuse of
17 this protocol. So I guess in a way it's sort of
18 flip-flopping what Mr. Kaiser and Mr. Gaffney and
19 Mr. Garrison have been arguing for in their response insofar
20 as what has to be demonstrated here.

21 Ultimately I find that given -- for the reasons
22 I've already stated that there is a justifiable reason here
23 to go ahead and proceed with the modified protocol submitted
24 by the plaintiffs to allow for that additional cushion of
25 time for these depositions. So the motion is granted for

1 those reasons.

2 If the plaintiffs can submit to me a revised,
3 updated version of the proposed order with any additional
4 accommodations that were discussed, Ms. Sims, and other
5 issues that are pertinent to the -- how the depositions will
6 move forward in a unified and consolidated matter here, you
7 can submit that to me. Try to get it to me by Monday, maybe
8 Tuesday --

9 **MS. SIMS:** Will do.

10 **THE COURT:** -- at the latest.

11 And I'll be seeing some of you-all next Friday
12 for a more extended hearing regarding some discovery
13 disputes, but that's not for today.

14 All right. With that, anything further for the
15 plaintiffs?

16 **MR. FALANGA:** Yes, Your Honor, Robert Falanga,
17 I'm the attorney for American Spirit. Just a housekeeping
18 matter, we are not getting notice of these hearings. I don't
19 know why, but for some reason we're on the pleadings but
20 we're not getting notified of the hearings. We weren't
21 notified of this hearing until we called your office to get a
22 link. If you could do that.

23 The second thing is --

24 **THE COURT:** So when you say the notice of the
25 hearing, was it just this notice? Are you getting other ECF

1 notices?

2 **MR. FALANGA:** Some of them we are. For some
3 reason, when we file and are listed in the pleadings it's not
4 getting filed into our docket. I don't know why.

5 **THE COURT:** So you're not -- all right. So you
6 say you didn't get notice of this hearing and you may not be
7 getting other notices?

8 **MR. FALANGA:** Correct, Your Honor. If you look
9 at your order setting this down and you look at all the
10 e-mails, neither myself nor my cocounsel Kobelah Bennah are
11 listed in that e-mail list. We found out about it from the
12 other cases. We're made aware of it but we're not included
13 in the mailings.

14 **THE COURT:** Okay. Well, I'm not aware of that,
15 but I'll alert my staff just -- maybe they can go into the
16 record and see what happened there, but we'll follow up on
17 that.

18 **MR. FALANGA:** And then the next thing, Your
19 Honor, is we were given a privileged log a couple of days ago
20 and in every single one of those privilege logs they say
21 attorney/client privilege, attorney/client privilege.
22 There's some that are with an attorney named Burton Bernhardt
23 which is the attorney for Varsity, the corporate attorney. I
24 agree that those may have attorney/client privilege, but
25 there's many, many e-mails in there that don't have anything

1 to do with an attorney. We would request like an in-camera
2 inspection of the privilege log documents so that when we
3 take for instance Bryan Ellis's deposition next Friday that
4 we have the correct documents that we need to go forward.

5 **THE COURT:** Okay. That sounds a lot more than
6 housekeeping, Mr. Falanga. That's quite a request. You're
7 raising challenges to an attorney -- assertion of
8 attorney/client privilege on a log which I haven't seen, for
9 documents I'm unaware of, for issues I don't know about.

10 **MR. FALANGA:** Correct.

11 **THE COURT:** And I'm not trying to minimize the
12 significance of this issue, but it's not presently before the
13 Court and this would not be the right venue to address it.
14 Now if there's a problem you can't work out with opposing
15 counsel after you've raised it and consulted as required by
16 local rules then you can file a motion.

17 **MR. FALANGA:** Yes, Your Honor. I just wanted to
18 bring it your attention because we did discuss it this
19 morning about filing a motion but it wouldn't be able to get
20 in front of you in time, and because of the timeliness of the
21 depositions being next week, we wanted to make sure that we
22 got this matter sorted out. We did put a call in to the
23 defendants and we are -- I'm sure that we'll hear from them
24 and maybe we can work it out, but I wanted you to be aware of
25 that.

1 The other thing, Judge, is that there was kind of
2 a misstatement made by Mr. Kaiser. He said that until the
3 motion to dismiss is decided by Judge Lipman there's a
4 restraining order to keep us from getting any of the
5 scholastic information or documents that we've requested.
6 And Judge Lipman did deny the motion to dismiss against
7 Varsity Holding Company. So it would be lifted as to that
8 company. We would take that position. So I just wanted to
9 correct the statement that he made that it would be as to all
10 defendants because she's already ruled on Varsity Holdings
11 that their motion to dismiss was denied, which should release
12 the restraining order.

13 **MR. KAISER:** Your Honor, I'm compelled to respond
14 to that.

15 **THE COURT:** And you can, Mr. Kaiser, to make a
16 record but I just want to --

17 **MR. KAISER:** I must.

18 **THE COURT:** Yeah. I'll let you do that. I will
19 allow to you do that, but when I asked if there's any other
20 matters to take up, I meant as to this motion, not just
21 broadly. I want to be respectful of counsel's time. There
22 are a bunch of lawyers on this call. So I try to move
23 efficiently if I can because I know you've got other things
24 to do. So if there's something that needs to be addressed on
25 an individual issue or motion or between parties then we can

1 take that up through a motion that's filed in the appropriate
2 case involving the specific parties. So I don't want to
3 utilize this as an opportunity to address matters that are
4 outside of what the motion was set.

5 Mr. Falanga, your issue about getting notice, we
6 will look into, but beyond that, we're really not in a
7 position today to be heard on the merits of any other
8 discovery issue, although I am on notice that there might be
9 something coming here shortly, but with that, Mr. Kaiser, you
10 can make the record.

11 **MR. KAISER:** Yes. Well, the Court granted
12 Varsity's motion to dismiss Bain and Charles Bank in Mr.
13 Falanga's case and you'll probably hear a little bit more
14 about that next week. There's a motion to dismiss on
15 identical grounds for those defendants pending in the other
16 case, the Jones case. But as to the issue that Mr. Falanga
17 raised, Varsity Holdings has a motion pending, which is the
18 motion that matters for purposes of the stay, which is a
19 motion to dismiss based on the merits which is the same
20 arguments that the other Varsity entities are making. This
21 motion that Judge Lipman addressed was -- had to do with
22 Varsity Holdings' ownership of the downstream entities. So
23 that issue has not been resolved. It's still pending with
24 Judge Lipman and the discovery stay remains in place from our
25 perspective, and I would suggest that American Spirit should

1 consider that before they make representations to the
2 contrary.

3 **THE COURT:** All right. Anyone else as to the
4 motion that was noticed for today? Any other outstanding
5 matters? No, okay.

6 All right. Well, I'll be looking for that
7 proposed order consistent with the Court's ruling. All
8 parties are excused.

9 **MS. SIMS:** Thank you, Your Honor.

10 **MS. MALONE:** Thank you, Your Honor.

11 **MR. KAISER:** Thank you.

12 (Adjournment.)

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C E R T I F I C A T E

I, LISA J. MAYO, do hereby certify that the foregoing 34 pages are, to the best of my knowledge, skill and abilities, a true and accurate transcript from my stenotype notes of the MOTION CONFERENCE on 12TH DAY OF NOVEMBER, 2021, in the matter of:

JONES, ET AL

VS.

BAIN CAPITAL PRIVATE EQUITY, ET AL.

Dated this 03.11.2022

S/Lisa J. Mayo

LISA J. MAYO, LCR, RDR, CRR
Official Court Reporter
United States District Court
Western District of Tennessee

UNREDACTED TRANSCRIPT